TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 695.

O. O. ASKREN, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, *ET AL.*, APPELLANTS,

vs.

THE CONTINENTAL OIL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

FILED JANUARY 22, 1921.

(28,052)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 23, 1921.

1 In the District Court of the United States for the District of New Mexico.

No. 679.

In Equity.

THE CONTINENTAL OIL COMPANY, a Corporation, Plaintiff,

vs.

O. O. ASKREN, Attorney General of the State of New Mexico; Charles U. Strong, Treasurer of the State of New Mexico; Manuel Martinez, Secretary of the State of New Mexico, and Alexander Read, District Attorney of the First Judicial District of the State of New Mexico, Defendants.

Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

To O. O. Askren, Attorney General of the State of New Mexico; Charles U. Strong, Treasurer of the State of New Mexico; Manuel Martinez, Secretary of State of the State of New Mexico, and Alexander Read, District Attorney of the First Judicial District of the State of New Mexico, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the State of Washington, in the District of Columbia, on the 5th day of February A. D. 1921, and pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States from the District of New Mexico, from a final decree signed, filed and entered on the 31st day of December, 1920, in that certain suit, being in Equity No. 679 and above entitled, wherein The Continental Oil Company, a corporation, is plaintiff, and you are
2 defendants therein and appellants herein, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Colin Neblett, United States District Judge for the District of New Mexico this 6th day of January, A. D. 1921, and of the Independence of the United States.

COLIN NEBLETT,
United States District Judge for the District of New Mexico.

The Appellee, the Continental Oil Company, hereby acknowledges the service upon it, this day the sixth day of January, 1921, of the foregoing citation.

THE CONTINENTAL OIL COMPANY,
A CORPORATION,
By E. R. WRIGHT,
One of Its Attorneys in said Cause.

3 Be it remembered, that on the 26th day of June, 1919, there was filed in the office of the Clerk of the District Court of the United States, for the District of New Mexico, in cause numbered 679 in Equity on the civil docket of said court, entitled as hereinafter set forth, a

Bill of Complaint,

in words and figures as follows, to-wit:

In Equity.

No. 679.

THE CONTINENTAL OIL COMPANY, a Corporation, Plaintiff,

v.

O. O. ASKREN, as Attorney General of the State of New Mexico, Charles U. Strong, as State Treasurer of the State of New Mexico, Manuel Martinez, as Secretary of State of the State of New Mexico, and Alexander Read, as District Attorney of the First Judicial District of the State of New Mexico, Defendants.

To the Honorable Colin Neblett, Judge of the District Court of the United States in and for the District of New Mexico:

The Continental Oil Company, a corporation duly organized under and by virtue of the laws of the State of Colorado, and a citizen of said state having its principal office at Denver, Colorado, brings this its bill against O. O. Askren, as Attorney General of the State of New Mexico; Charles U. Strong as Treasurer of the State of New Mexico, Manuel Martinez, as Secretary of State of the State of New Mexico, and Alexander Read, as District Attorney of the First Judicial District of the State of New Mexico, all citizens of the state of New Mexico, residing at Santa Fe, in said state.

And for its cause of action against the defendants states:

4 1. That the plaintiff, The Continental Oil Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Colorado, and has its principal office at the city of Denver, in the state of Colorado, and is a citizen and resident of said state of Colorado; that it is now and at all times hereinafter named has been duly authorized to do business within the state of New Mexico; that the defendant O. O. Askren is the duly elected

qualified and acting Attorney General of the state of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe in said state; that the defendant Charles U. Strong, is the duly elected, qualified and acting Treasurer of the State of New Mexico, and is a resident and citizen of said State of New Mexico, and resides at Santa Fe in said state; that the defendant Manuel Martinez is the duly elected, qualified and acting Secretary of State of the state of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe in said state; that the defendant Alexander Read is the duly elected, qualified and acting District Attorney of the First Judicial District of the State of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe in said state.

2. That the amount in controversy in this suit exceeds the sum of Three thousand dollars ($3,000.), exclusive of interest and costs, and involves a question arising under the Constitution and laws of the United States with respect to the validity, when tested by the Constitution of the United States, of that act of the legislature of the state of New Mexico entitled: "An Act Providing for an Excise Tax Upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein, Providing for the Inspection of Gasoline, and Making it Unlawful to Sell Gasoline below a Certain Grade without Notifying the Purchaser; Providing Penalties for Violations of this Act, and for Other Purposes," approved March 17th, 1919; that it is specially claimed in this suit by the plaintiff that said act of the legislature of the state of New Mexico is unconstitutional and in violation of Section 8 of Article I of the Constitution of the United States, which vests in the Congress the exclusive power to regulate commerce between the states, and that said act also is in violation of Section 10 of Article I of the Constitution of the United States which prohibits any state without the consent of the Congress, from laying any duties upon imports or exports except such as are absolutely necessary for the execution of its inspection laws, and this suit is between citizens of different states.

3. That the plaintiff is, and at all times herein named has been, engaged in business as a merchant and in buying and selling gasoline and other petroleum products; that in the usual and regular course of its business the plaintiff purchases gasoline in the states of Colorado, California, Oklahoma, Texas and Kansas, and from each and all of said states ships gasoline into the state of New Mexico there to be sold and delivered to its customers in said state; that in the usual and ordinary method for the conduct of its business which had been adopted and had long been in use prior to the enactment of the statute aforesaid and which is still in use, the plaintiff purchases in the states of Colorado, California, Oklahoma, Texas and Kansas, or in some one of said states, gasoline, and ships said gasoline in tank cars from the state in which purchased into the state of New Mexico, and there, according to its custom and the ordinary method in the conduct of its business, it sells in said tank cars the whole of the

contents thereof to a single customer, and before the package or packages in which the gasoline was shipped have been broken; that in the usual and regular course of its business it purchases gasoline in one of the states aforesaid other than the state of New
6 Mexico, and ships the gasoline so purchased from that state in barrels and in packages containing not less than Two (2) 5-Gallon cans into the state of New Mexico and there, in the usual and ordinary course of its business, without breaking said barrels or packages containing said cans, it is accustomed to sell and was accustomed to sell prior to the enactment of the law aforesaid the gasoline in said original barrels and packages, and according to said custom the said gasoline is sold and delivered to the customers of the plaintiff in precisely the same form and condition as when received in the state of New Mexico; that the gasoline purchased, shipped and sold as aforesaid in said tank cars, barrels and packages containing cans of gasoline is not purchased from a licensed distributor of gasoline in the state of New Mexico, and accordingly the plaintiff, in shipping, selling and disposing of gasoline in the manner aforesaid, is a distributor of gasoline as the term "distributor" is defined by the aforesaid act of the legislature of the state of New Mexico; that plaintiff has in the state of New Mexico Thirty-seven (37) stations to which it ships gasoline from time to time in the regular course of its business in the manner hereinabove described, and from which it sells gasoline in the manner above stated; that said act of the legislature of the state of New Mexico requires the plaintiff to pay the sum of Fifty dollars ($50) per annum for each of its said stations as an annual license tax for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid, and said act declares it to be unlawful for any person to distribute or sell gasoline after July 1, 1919, without having paid said license tax; that said act requires the plaintiff to make application to the Secretary of State, who is authorized to issue said license, and to accompany said application with a remittance of the amount of the license; that said act further exacts of the plaintiff that it shall pay for the privilege
7 of shipping and selling gasoline in interstate commerce in the manner aforesaid what the act terms an excise tax of two cents (2c) for each and every gallon of gasoline so as aforesaid shipped and sold; that for the privilege of engaging in interstate commerce in the manner aforesaid said act further requires that the plaintiff shall render to the State Auditor a monthly statement in such form as said Auditor shall prescribe of all gasoline received and sold by the plaintiff during the preceding month, accompanied by a remittance of the amount of money equal in the aggregate to two cents for each gallon shipped and sold in interstate commerce in the manner aforesaid; that it is provided by said act that any person who shall engage or continue in the business of selling gasoline in the state of New Mexico without paying said taxes for the privilege of doing so shall be deemed guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than One hundred dollars ($100) nor more than One thousand dollars ($1,000) or by imprisonment in the county jail for not more than Ninety (90) days,

or by both such fine and imprisonment, and it is further provided by said act that any person failing to pay said license tax shall be enjoined in an action brought in the name of the state from *from* further distributing or selling gasoline in the state of New Mexico; that it is further provided that to said tax shall be added as a penalty five per cent (5%) of the amount thereof, and a monthly interest of one per cent (1%) until it shall be paid, and that it shall be the duty of the State Treasurer to cause suit to be brought in the name of the state to collect such tax, penalty and interest, and it is declared to be the duty of the Attorney General of the state of New Mexico and the District Attorney to commence and prosecute such suit or suits at the request of the Treasurer; that said taxes constitute an unlawful burden upon interstate commerce, and the act of the legislature aforesaid imposing such taxes for the privilege of engaging in interstate
8 commerce as aforesaid is in conflict with those provisions of the Constitution of the United States hereinabove mentioned and is absolutely void; that said act of the legislature of the state of New Mexico provides for the appointment of inspectors, one for each of the eight judicial districts of the state, but said inspectors are not required by said act to inspect any gasoline sold or used in said state, and no inspection of gasoline sold in the state of New Mexico is required to be made; that all gasoline sold, used or distributed in the State of New Mexico is imported into the state in interstate commerce, and no gasoline is produced in the state of New Mexico; that in addition to the sales of gasoline as aforesaid the plaintiff ships gasoline as aforesaid from some or all of the states aforesaid in tanks, barrels, or packages, and sells said gasoline so shipped from said tanks, barrels and packages in such quantities as the purchaser desires.

That upon and after the first day of July, 1919, unless prevented by writ of injunction of this Honorable Court, the defendants will seek to enforce the said unconstitutional act of the legislature of New Mexico, and unless the plaintiff submits to the unlawful exactions and pays the said unlawful charges for the privilege of continuing in business defendants will enjoin the plaintiff from the conduct of its business and will cause the officers and agents of the plaintiff at each and all of its various stations aforesaid to be arrested, prosecuted and fined, and if it continues to carry on and conduct its business in interstate commerce as aforesaid without paying to the state of New Mexico the sums of money exacted by said act for the privilege of doing so suits will be started from time to time for the collection of said unlawful exactions for the privilege of engaging in interstate commerce, and the plaintiff's business destroyed or materially injured, and the plaintiff will be subjected to the burdens of a multiplicity of suits to enforce the collection of said unlawful
9 exactions, and its officers and agents will be hampered and restrained by arrests and prosecutions unless it submits to said unlawful exactions; that the plaintiff has no plain, adequate or complete remedy at law by reason of the matters and things hereinabove set forth, and unless this court of equity takes jurisdiction hereof and grants plaintiff the injunction as herein prayed, the plaintiff

will suffer great and irreparable injury as hereinbefore set forth; that immediate and irreparable injury and damage will result to the plaintiff before this cause can be heard or notice duly and regularly given, unless a temporary restraining order is granted.

4. That the plaintiff, in addition to being engaged in the business of buying and selling gasoline and other petroleum products as hereinbefore alleged, also uses gasoline at each of its distributing stations within the State of New Mexico, in the operation of its automobile tank wagons and otherwise; that said gasoline so used by the plaintiff is part and parcel of the gasoline shipped into the State of New Mexico by the plaintiff in tank cars as hereinbefore alleged; that under the terms and provisions of said act of the New Mexico Legislature the plaintiff is prohibited from so using said gasoline except upon the payment of the so-called excise tax of two cents per gallon therefor; that said two cent tax so imposed upon the use of said gasoline by the plaintiff is in fact and law a property tax and as such void under the provisions of Section 1 of Article VIII of the Constitution of the State of New Mexico, for the reason same is not levied in proportion to the value of said gasoline, but is a fixed and arbitrary tax, fixed and determined without regard to the value of each and every gallon of said gasoline; that said tax of two cents per gallon upon all gasoline so used by the plaintiff, so arbitrarily imposed, denies to the plaintiff the equal protection of the laws, and amounts to a taking of plaintiff's property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States; and further, is in violation of Section 8 of Article I of the Constitution of the United States which vests in Congress the exclusive power to regulate commerce between the states, in that it prohibits plaintiff from using or enjoying gasoline so shipped in interstate commerce, except upon and after the payment of a tax of two cents per gallon thereon.

Wherefore, forasmuch as the plaintiff is without any adequate remedy at law, and to the end that the plaintiff may obtain relief in this court of equity, where such matters are properly cognizable, plaintiff prays:

That Your Honor grant unto the plaintiff a writ of subpœna directed to the said defendants and each of them requiring each of them to answer this bill of complaint, but not under oath, an answer under oath being hereby expressly waived as to each of the defendants; that a temporary restraining order be issued against defendants and each of them and all persons acting through or under them or either of them, or under the direction of either or any of them enjoining them and each of them from taking any action looking to the enforcement of the aforesaid act of the legislature of the state of New Mexico, and that said act be declared by this court to be unconstitutional and void, and that this Honorable Court, upon the issuing of said temporary restraining order appoint a day when the parties may be heard upon plaintiff's application for a preliminary injunction, and that upon said day the court grant unto this plain-

tiff its preliminary injunction to the same effect as aforesaid,
10 and that upon final hearing said injunction be made perpetual; and that the plaintiff have such other and further relief, both general and special, as it may appear in equity to be entitled to, and that it have judgment for costs of suit.

E. R. WRIGHT,
S. B. DAVIS, JR.,
MILTON SMITH,
CHAS. R. BROCK,
W. H. FERGUSON,
Solicitors for Plaintiff.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

E. R. Wright, being first duly sworn, on oath deposes and says: That he is one of the solicitors for the plaintiff in the above entitled suit, that he has read the foregoing bill of complaint and knows the contents thereof, and that the allegations therein made are true to the best of his knowledge, information and belief, and that he makes this verification on behalf of the plaintiff because it is a corporation.

E. R. WRIGHT.

Subscribed and sworn to before me this 26th day of June, A. D. 1919.

My commission expires Oct. 2, 1920.

[SEAL.] ROBERT L. ORMSBEE,
Notary Public.

11 (*Defendant's Motion to Dismiss Bill. Filed July* 1, 1919.)

Come now the defendants herein and move the Court to dismiss the bill herein filed, and for their reason for said motion say,

That the said bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient entitle plaintiff to any relief against these defendants.

Wherefore, defendants pray that the bill herein be dismissed with their costs.

O. O. ASKREN,
A. B. RENEHAN,
HARRY S. BOWMAN,
N. D. MEYER,
Solicitors for Defendants.

I, Harry S. Bowman, solicitor for the defendants in the above entitled matter, do hereby certify that the foregoing motion in my opinion is well founded in law.

HARRY S. BOWMAN,
Solicitor for Defendants.

O. O. Askren, being first duly sworn, upon his oath, says that he is one of the defendants in the above entitled action, and that the foregoing motion is not interposed for the purpose of delay.

O. O. ASKREN.

Subscribed and sworn to before me this 1st day of July, A. D. 1919.

[Seal U. S. Dist. Court.]

WYLY PARSONS,
Clerk U. S. Dist. Court.

12 (*Order. Filed and Entered of Record July* 3, 1919.)

This cause came on to be heard at this term upon the motion of the defendants to dismiss and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that said motion be, and the same hereby is overruled, to which the defendants and each of them except, and it is further ordered that the defendants be given ten (10) days to answer the bill of complaint herein.

Done in open court this 3rd day of July, 1919.
By the Court:

COLIN NEBLETT,
United States District Judge.

(Answer. Filed August 10, 1920.)

Now come the defendants, O. O. Askren, as Attorney General of the State of New Mexico; Charles U. Strong, as State Treasurer thereof; Manuel Martinez, as Secretary of State thereof and Alexander Read as District Attorney of the First Judicial District of the State of New Mexico, and for answer to the complaint herein say:

1. They admit that the plaintiff, The Continental Oil Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, and has its principal office at the City of Denver, in the State of Colorado, and is a citizen and resident of the State of Colorado; that it was at all times stated in the first paragraph of the complaint and has been at all such times duly authorized to do business in the State of New Mexico; that the defendant, O. O. Askren, is the duly elected, qualified and acting Attorney General of the State of New Mexico, and is a resi-
13 dent and citizen of said State, residing at Santa Fe therein; that the defendant, Charles U. Strong, is the duly elected, qualified and acting Treasurer of the said State, and a resident and citizen thereof, at Santa Fe therein; that the defendant, Manuel Martinez, is the duly elected, qualified and acting Secretary of State of the State of New Mexico, and a resident and citizen thereof, at Santa Fe therein; that the defendant, Alexander Read, is the duly elected, qualified and acting District Attorney of the First Judicial District of the State of New Mexico, and a resident and citizen thereof, at Santa Fe therein.

2. They admit that the amount in controversy in this suit exceeds the sum of $3,000.00 exclusive of interest and costs, and they admit the allegations of questions and claims involved in the second paragraph of the complaint, but they deny that the said act of the Legislature violates Sections 8 or 10 of Article I of the Constitution of the United States.

3. They admit that the plaintiff is, and at all time stated in the complaint was and has been engaged in business as a merchant, and in buying and selling gasoline and other petroleum products; that in the usual and regular course of its business the plaintiff purchases gasoline in the States of Texas and Oklahoma, and from said States ships gasoline into the State of New Mexico, there to be sold and delivered to its customers in said State; that in the usual and ordinary method for the conduct of its business, the plaintiff purchases in the States of Texas and Oklahoma, or in one of said States, gasoline, and ships said gasoline in tank cars from the State in which purchased into the State of New Mexico, but they deny that there, according to its custom and the ordinary method in the conduct of its business, it sells in said tank car or tank cars the whole of the contents thereof to a single customer before the package or packages, to wit, such tank car or tank cars, in which the gasoline was shipped, have been broken, but they aver that if the said company, in the course of its business, and according to its cus-
14 tom, at any time sells the whole of the contents of such tank or tank cars to a single customer, and before the package or packages in which the gasoline was shipped have been broken, that in the course of the said business such method of selling is only occasional and rare, and that the quantity of gasoline so sold in such package or packages, to wit, tank car or tank cars, unbroken, one day, one week, one month or one year, taken with another, and in the ordinary course of the said business generally, is insignificant as compared with sales made by it, at retail, or after original packages have been broken, and that such business done in original packages they are informed and believe, and upon information and belief say, does not constitute more than one or two per cent of the gross business done in gasoline sales; they deny that in the usual and regular course of its business it purchases gasoline in some one of the States other than New Mexico aforesaid, and ships the gasoline so purchased from that state in barrels and in packages containing not less than two 5-gallon cans into the State of New Mexico, and they deny that there in the usual and ordinary course of its business, without breaking said barrels or packages containing said cans, it is accustomed to sell and was accustomed to sell, prior to the enactment of the law complained of, gasoline in said original barrels and packages, and they deny that according to said custom the gasoline is sold and delivered to the customers of the plaintiff in precisely the same form and condition as when received in the State of New Mexico, but they say that the introduction by it of gasoline in barrels or packages containing not less than two 5-gallon cans into the State of New Mexico is only occasional, extraordinary and rare, and that

the gasoline so introduced and sold in barrels and two can packages constitutes a very small and insignificant portion of the plaintiff's gasoline business, in the State of New Mexico, not exceeding, as these defendants are informed and believe, and upon infor-
15 mation and belief say, taken together with gasoline sold in original tank cars, if any, one or two per cent of the gross business in gasoline done by the plaintiff in the State of New Mexico; and they aver that the usual and ordinary custom of the plaintiff in the transaction of its business in gasoline, in the State of New Mexico, is as hereinafter, in this answer, set forth; they admit that the gasoline purchased, shipped and sold as aforesaid in said tank cars, barrels and packages containing cans of gasoline, is not purchased from a licensed distributor of gasoline in the State of New Mexico, and that it is a distributor of gasoline as the term distributor is defined by the act of the New Mexico Legislature which is complained of; they admit that the plaintiff has in the State of New Mexico 37 stations to which it ships gasoline from time to time, in the regular course of its business in the manner described, and from time to time sells gasoline in the manner stated by it, but with the limitations upon the manner of introducing, receiving, handling and selling such commodity which are in this answer alleged; they admit that the said act requires the plaintiff to pay the sum of $50.00 per annum for each of the plaintiff's said stations as an annual license tax, but they deny that it is for the privilege of shipping and selling gasoline in interstate commerce, in the manner aforesaid, or in any other manner and they declare that it is not their purpose as officers charged with the performance of duties under the said act, nor is it the purpose of the State of New Mexico thereunder to interfere with, lay burdens upon or to tax any gasoline brought into the State of New Mexico by the plaintiff which remains interstate commerce, but only to direct and operate such law in respect to such gasoline brought into or found within the State of New Mexico, which has ceased to be in interstate commerce, but has become a matter of intrastate commerce and mingled with the mass of
16 property in said state; they admit that said act declares it to be unlawful for any person to distribute or sell gasoline after July 1, 1919, without having paid said license tax, and requires the plaintiff to make application to the Secretary of State for such license and to accompany its application with the remittance of the amount of the license; but they deny that said act exacts of the plaintiff that it shall pay for the privilege of shipping or selling gasoline in interstate commerce in the manner aforesaid, or in any other manner, what the said act terms an excise tax of two cents for each and every gallon of gasoline so as aforesaid shipped and sold, and they say that the law officers of the State of New Mexico, and its officers charged with the enforcement of the said law, and the State of New Mexico do not construe the said act as affecting interstate commerce, and have no purpose or intention to enforce it in such manner, but only in so far as intrastate commerce is concerned; they deny that for the privilege of engaging in interstate commerce, as pretended and alleged in the complaint, or at all for such privilege, it is required

that the plaintiff shall render to the State Auditor a monthly statement, in such form as the said Auditor shall prescribe, of all gasoline received and sold by the plaintiff during the preceding month, accompanied by a remittance of the amount equal in the aggregate to two cents for each gallon shipped and sold in interstate commerce as alleged, but they say that the said provisions of the said law relate only to intrastate commerce in said commodity, and that they and the State of New Mexico have no intention otherwise to apply it; they admit that it is provided by the said act that any person who shall engage in or continue in the business of selling gasoline in the State of New Mexico without having paid said taxes, shall be deemed guilty of a misdemeanor and punishable by a fine or imprisonment as stated, on conviction, but they deny that such provision of the law in any way concerns interstate commerce; they admit
17 that it is further provided by the said act that any person affected thereby, failing to pay said tax, shall be enjoined in an action brought in the name of the State from further distributing or selling gasoline in the State of New Mexico; they admit that it is further provided that to said tax shall be added as a penalty five per cent (5%) of the amount thereof, and a monthly interest of one per cent (1%) until it shall be paid, and that it shall be the duty of the State Treasurer to cause suit to be brought in the name of the State to collect such tax, penalty and interest, and that it is declared to be the duty of the Attorney General of the State of New Mexico and the District Attorney to commence and prosecute such suit or suits at the request of the Treasurer; they deny that such taxes constitute an unlawful or any burden upon interstate commerce, or that it is the intention of said law to affect interstate commerce therewith or to affect any dealing in or handling gasoline therewith which has not ceased to be in interstate commerce; they deny that said act of the legislature imposing such taxes is for the privilege of engaging in interstate commerce, and aver that the said state of New Mexico and the law officers thereof do not and will not so apply the said law, but that it is and will be construed only as affecting such business as is intrastate and such as has ceased to be interstate; and they deny that said act is or is intended to be or will be treated as affecting interstate business or commerce in said commodity; and they deny that the said act is in conflict with any provisions of the Constitution of the United States mentioned in the complaint, or any provision thereof; and they deny that it is absolutely or otherwise void; they admit that the said act of the legislature of the State of New Mexico provides for the appointment of inspectors, one for each of the judicial districts of the State, but they deny that such inspectors are not required by said act to inspect any gasoline
18 sold or used in said State, and they deny that no inspection of gasoline sold in the State is required to be made; they admit that all gasoline sold, used or distributed in the State of New Mexico is imported into the State in interstate commerce, and that no gasoline is at present produced in the said State, but they aver that works and refineries for the manufacture of gasoline are being built in New Mexico, and were in contemplation at and before the

passage of the said act; and they further aver that the State of New Mexico owns a vast acreage of land which is believed to be oil bearing, and so owned it at and before the passage of the act in question, and has leased it and is leasing the same for the production of petroleum, which is the basis of gasoline; they admit that in addition to the sales of gasoline previously described in the complaint, as qualified by this answer, the plaintiff ships gasoline from some or all of the states by it, in its complaint, previously mentioned, in tanks, barrels or packages, and sells said gasoline so shipped from said tanks, barrels or packages in such quantities as the purchaser may desire, and this they say is the usual and ordinary method of the plaintiff's business in gasoline, and forms the much greater part of its said business in gasoline, to wit, substantially 98% thereof in this State.

4. These defendants admit that on and after the first day of July, 1919, unless prevented by writ of injunction out of this court, it was their intention to and they would enforce the said act of the legislature of this state, but they deny that it was or is an unconstitutional act, and they admit that unless the plaintiff submit to the exactions of the said law, and pay the said charges, both of which they deny are unlawful, they, as law-officers of the said State and laden with such duty, would and will enjoin the plaintiff, in accordance with the statute, from the conduct of its said business, but only in so far as that business is intrastate commerce, but in no respect affecting any part of the said business which is interstate, except
19 in regard to the license tax, which cannot be apportioned, but in which regard they allege that the quantity of business at the several stations done in interstate commerce is insignificant as compared with the quantity done thereat in intrastate business, the said stations being respectively used for the purpose of both interstate and intrastate business in gasoline, the respective proportions being substantially 2% interstate and 98% intrastate; they admit that for failure of the plaintiff to comply with the requirements of the said statute, the penalties thereof will be enforced by them, but only in respect to such intrastate business and commerce, without regard to the results to the plaintiff, its officers and agents, from infraction of the said law.

5. These defendants say that it is immaterial whether or not gasoline is the only article of commerce upon which an excise tax is imposed by the State of New Mexico, and they deny that such imposition constitutes a discrimination against the products of the States of Colorado, California, Oklahoma, Texas or Kansas, or any other State, or against the plaintiff, or a denial to it of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

6. These defendants say that they have no knowledge or information sufficient to enable them or either of them to form a belief concerning the alleged use of gasoline by the plaintiffs at its said distributing stations, or of what it is part or parcel, and therefore

deny the allegations of the fourth paragraph of the complaint in these respects; and they deny that it is the intention of the said defendants or either of them or of the State of New Mexico, or the meaning of the act of the legislature which is in question, that the said gallon tax shall be imposed on gasoline so used, or the act in such manner enforced, except they say that if the gasoline so used shall have been brought in and commingled with the general mass of the property in the said State, and thereafter used as alleged in the complaint, it would be subject to the said tax, and only in such event would the said tax be required in respect thereto, but that so long as such gasoline remained in interstate commerce, it would not be affected; and they further deny the allegations of the said paragraph of the complaint that the said tax is a void property tax under section I of Art. VIII of the New Mexico constitution, for the reason stated or any reason, or that it denies to the plaintiff the equal protection of the law or the taking of property without due process of law, under the 14th amendment to the Federal Constitution, or a violation of sec. 8 of Art. I of said constitution in reference to commerce between the States; and they say that the said allegations are immaterial and de minimis.

Further answering the defendants say:

1. That the plaintiff, from outside, brings gasoline from time to time into this State, to its several stations, as its usual and ordinary business custom, in tank cars, and from such tank cars draws gasoline into fixed tanks, and into barrels and into cans containing five (5) gallons, and into wagon tanks, and from such fixed tanks fills barrels, and five-gallon cans and other receptacles, and loads such wagon-tanks, and thereupon sells the gasoline to customers, in quantities to suit them, to-wit: by drawing the same from such wagon-tanks, which are driven about from place to place, in the city, town or place where the said several stations are respectively established; by delivering to them barrels which have been already filled, as aforesaid, or by filling a barrel or barrels for the particular occasion; by delivering to them 5-gallon cans of gasoline already filled as aforesaid or filled for the occasion, and by filling from such wagon-tanks, fixed tanks, barrels or cans receptacles brought for the purpose by the customer, and such has been and is its usual, ordinary and general custom in the making of sales and deliveries of gasoline; that in its usual and ordinary business custom, the only original package in which the plaintiff receives gasoline is the tank car, which is a sort of conveyance by railroad, moving on wheeled trucks, forming usually a part of a railroad train, drawn by a locomotive engine, which is emptied, as aforesaid, of its contents, usually immediately after its arrival, at one or the other of the said stations, and is then taken away as part of the same railroad train which brought it, or another railroad train.

Wherefore the defendants pray that the temporary injunction hereinbefore granted may be dissolved and the complaint dismissed at the plaintiff's costs, with attorneys' fees, according to law.

O. O. ASKREN,
Attorney General, Attorney for the Defendants.
H. S. BOWMAN,
Assistant Attorney General, Attorney for the Defendants.
A. B. RENEHAN,
Special Assistant Attorney General, Attorney for the Defendants.

All of Santa Fe, New Mexico.

STATE OF NEW MEXICO,
County of Santa Fe:

O. O. Askren, being first duly sworn, upon his oath, says: That he is one of the defendants in the said cause; that he has read over and knows the contents of the foregoing answer, and that
21 the same are true of his own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to them he believes it to be true.

O. O. ASKREN.

Subscribed and sworn to before me this 6th day of August, 1920.
[Notarial Seal.] STELLA V. CANNY,
Notary Public.

My comm. expires April 9, 1921.

(*Plaintiff's Motion to Strike, Filed October* 11, 1920.)

Now comes the plaintiff, by its attorneys, and moves to strike from the answer of the defendants the following:

(1) From Paragraph "3" thereof, the following allegation:

"but they aver that if the said company, in the course of its business, and according to its custom, at any time sells the whole of the contents of such tank car or tank cars to a single customer, and before the package or packages in which the gasoline was shipped have been broken, that in the course of the said business such method of selling is only occasional and rare, and that the quantity of gasoline so sold in such package or packages, to-wit: tank car or tank cars, unbroken, one day, one week, one month or one year, taken with another, and in the ordinary course of the said business generally, is insignificant as compared with sales made by it, at retail, or after original packages have been broken, and that such business done in original packages they are informed and believe, and upon information and belief say, does not con-
22 stitute more than one or two per cent of the gross business in gasoline sales;"

and, further, the following allegation:

"but they say that the introduction by it of gasoline in barrels or packages containing not less than two 5-gallon cans into the State of New Mexico is only occasional, extraordinary and rare, and that the gasoline so introduced and sold in barrels and two can packages constitutes a very small and insignificant portion of the plaintiff's gasoline business, in the State of New Mexico, not exceeding, as these defendants are informed and believe, and upon information and belief say, taken together with gasoline sold in original tank cars, if any, one or two per cent of the gross business in gasoline done by the plaintiff in the State of New Mexico; and they aver that the usual and ordinary custom of the plaintiff in the transaction of its business in gasoline, in the State of New Mexico, is as hereinafter, in this answer, set forth;"

and, further, the following allegation:

"and they declare that it is not their purpose as officers charged with the performance of duties under the said act, nor is it the purpose of the State of New Mexico thereunder to interfere with, lay burdens upon or to tax any gasoline brought into the State of New Mexico by the plaintiff which remains interstate commerce, but only to direct and operate such law in respect of such gasoline brought into or found within the state of New Mexico, which has ceased to be in interstate commerce, but has become a matter of intrastate commerce and mingled with the mass of property in said state;"

23 and, further, the following allegation:

"and they say that the law officers of the State of New Mexico, and its officers charged with the enforcement of the said law, and the State of New Mexico, do not construe the said act as affecting interstate commerce, and have no purpose or intention to enforce it in such manner, but only in so far as intrastate commerce is concerned;"

and, further, the following allegation:

"but they say that the said provisions of the said law relate only to intrastate commerce in said commodity, and that they and the State of New Mexico have no intention otherwise to apply it;"

and, further, the following allegation:

"and aver that the said State of New Mexico and the law officers thereof do not and will not so apply the said law, but that it is and will be considered only as affecting such business as is intrastate and such as has ceased to be interstate;"

and, further, the following allegation:

"but they aver that works and refineries for the manufacture of gasoline are being built in New Mexico, and were in contemplation

at and before the passage of the said act; and they further aver that the State of New Mexico owns a vast acreage of land which is believed to be oil bearing, and so owned it at and before the passage of the act in question, and has leased it and is leasing the same for the production of petroleum, which is the basis of gasoline;"

and, further, the following allegation:

"And this they say is the usual and ordinary method of the plaintiff's business in gasoline, and forms the much greater part of its said business in gasoline, to-wit, substantially 98% thereof in this State."

24 for the reason that each and every one of said allegations is immaterial, irrelevant and redundant, and does not state facts constituting a defense or in defense of the allegations of the complaint, and for the further reason that it affirmatively appears from the face of the Act in question that the same applies alike to interstate and intrastate commerce, with no distinction made in the law, and for the further reason that it appears affirmatively from the face of said Act that the same is not separable and cannot be construed so as to apply only to intrastate commerce as distinct and separate from interstate commerce.

(2) From paragraph "4" of said answer, the following allegations:

"but only insofar as that business is intrastate commerce, but in no respect affecting any part of the said business which is interstate, except in regard to the license tax, which cannot be apportioned, but in which regard they allege that the quantity of business at the several stations done in interstate commerce is insignificant as compared with the quantity done thereat in intrastate business, the said stations being respectively used for the purpose of both interstate and intrastate business in gasoline, the respective proportions being substantially 2% interstate and 98% intrastate; they admit that for the failure of the plaintiff to comply with the requirements of the said state, the penalties thereof will be enforced by them, but only in respect to such intrastate business and commerce, without regard to the results to the plaintiff, its officers and agents, from infraction of the said law."

for the reason that each and every one of said allegations is immaterial, irrelevant and redundant, and does not state facts constituting a defense or in defense of the allegations of the com-
25 plaint, and for the further reasons that it affirmatively appears from the face of the Act in question that the same applies alike to interstate and intrastate commerce, with no distinction made in the law, and for the further reason that it appears affirmatively from the face of said Act that the same is not separable and c-nnot be construed so as to apply only to intrastate commerce as distinct and separate from interstate commerce.

(3) All that portion of said answer by way of further answer to the complaint, for the reason that each and every one of said allegations is immaterial, irrelevant and redundant, and does not state facts constituting a defense or in defense of the allegations of the complaint, and for the further reason that it affirmatively appears from the face of the Act in question that the same applies alike to interstate and intrastate commerce, with no distinction made in the law, and for the further reason that it appears affirmatively from the face of said Act that the same is not separable and cannot be construed so as to apply only to intrastate commerce as distinct and separate from interstate commerce.

CHARLES R. BROCK,
Denver, Colorado;
STEPHEN B. DAVIS, JR.,
Las Vegas, New Mexico;
E. R. WRIT,
Sante Fe, New Mexico,
Attorneys for the Above Plaintiff.

(*Opinion. Filed December* 30, 1920.)

This case came on for final hearing and was submitted to the court for determination upon the following stipulation:

"By Mr. Brock: It is stipulated by the plaintiff and defendants that within the year 1918 in the regular course of business, the Continental Oil Company shipped from other states into the
26 State of New Mexico, 77,243 barrels of gasoline of 50 gallons each, and sold that quantity of gasoline after breaking the packages, barrels and tanks in which it was shipped, and that this quantity is the aggregate of sales made in that year in broken packages in the various ways in which such sales were conducted by the Continental Oil Company; that is, from barrels or cases, or from bulk (by which is meant stationary tanks) stored in the state or from milk cans or tank wagons.

"It is also agreed that within the year 1918 in the regular course of business, the Continental Oil Company shipped into the State of New Mexico from other states, 4,608 barrels of gasoline of 50 gallons each, all of which was sold in the barrels, packages or tank cars in which shipped, and without breaking the packages in which the shipment was made.

"It is also stipulated that in the year 1919, the aggregate sales made in the way first above described, that is, from broken packages, of gasoline shipped into the State of New Mexico from other states, amounted to 74,998 barrels of 50 gallons each, and the aggregate quantity of gasoline shipped into New Mexico and sold in the manner secondly above described, that is in the containers in which shipped, amounted to 1687 barrels of 50 gallons each.

"It is also stipulated that for the first 7 months of the year 1920, the Continental Oil Company sold, in the manner first above described, that is from broken packages of gasoline shipped into the

state of New Mexico from other states, the aggregate quantity of 50,447 barrels of 50 gallons each, and during the same time shipped and sold in the manner secondly above described, that is, shipped into the state from other states and sold in the containers in which shipped, 5,291 barrels of 50 gallons each.

"It is further stipulated that as to the year 1919, of the total sold in broken packages 31,551 barrels of gasoline was sold prior to July 1st of that year, and 356 barrels within the same time was sold in the containers in which shipped into the State. That during the second half of 1919 there was sold in broken packages 43,447 barrels of gasoline of 50 gallons each, and in the containers in which
27 shipped, there was sold during the same time 1,331 barrels of 50 gallons each.

"It is further stipulated that from July 1, 1919, to August 1, 1920, the Continental Oil Company consumed for its own use of gasoline which it had shipped from other states, 7,984 gallons; this quantity being consumed by the plaintiff in the regular conduct of its business. Of this quantity 3,600 gallons were consumed from July, 1919, to December, 1919, inclusive, and 4,384 gallons were consumed and used from January, 1920, to July 1920, inclusive.

"By Mr. Renehan: The statement of sales and use of gasoline as aforesaid represents the ordinary course of business of the said Company as conducted during this period and for the purpose of this case representing the ordinary business of the company, but so far as the percentages of the two kinds of business are concerned, it merely represents the actual facts for the time mentioned and it is admitted that the future percentages will depend upon the circumstances and demands of the customers of the company."

This is a suit brought by the plaintiff seeking to enjoin the defendants from the enforcement of an Act of the Legislature of the State of New Mexico, entitled "An Act Providing for an Excise Tax upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers therein; Providing for Collection and application of Such Taxes; Providing for the Inspection of Gasoline and making it Unlawful to sell Gasoline below a Certain Grade without Notifying Purchaser Thereof; Providing Penalties for Violations of this Act and for other Purposes," 1919 Session Laws of New Mexico, Chapter 93.

This Act, among other provisions, contains the following:

Sec. 1. * * * The term distributor of gasoline means every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this state. * * *

Sec. 2. * * * Every distributor of gasoline shall pay
28 an annual license tax of fifty dollars for each distributing station or place of business or agency. * * *

Sec. 3. There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this state after July 1st,

1919, which tax shall be paid as hereinafter provided at the rate of two cents per gallon upon all gasoline so sold or used. * * *

Said Act provides in Sections 2 and 3 the amount of the license tax and for a tax of two cents per gallon on all gasoline sold or used, and it is made a misdemeanor for anyone to knowingly sell, distribute or use gasoline without the tax upon the sale or use thereof having been paid, or provided for, as required in the Act, and provides other penalties for the violations of the provisions of the Act.

The Supreme Court of the United States in passing upon this Act in the case of Askren, et al. v. The Continental Oil Company, said:

"It is evident from the provisions of the act thus stated that it is not an inspection act merely; indeed, the inspectors do not seem to be required to make any inspection beyond seeing that the provisions of the act are enforced, and the excess of the salaries and fees of the inspectors is to be used in making roads within the State. Considering its provisions and the effect of the act, it is a tax upon the privilege of dealing in gasoline in the State of New Mexico."

The plaintiff is engaged in the business of buying and selling gasoline in the State of New Mexico, and maintains 37 distributing stations or places of business in the State. The plaintiff also uses gasoline in its cars and trucks used by it in conducting its said business.

29 Plaintiff conducts its business in the following manner:

1. It ships into the State of New Mexico from other states, gasoline in barrels, packages and tank cars, and sells the same in the ordinary course of its business to its customers in the barrels, packages and tank cars in which it is shipped, without breaking the packages.

2. It ships into the State of New Mexico from other states, gasoline, and in the regular course of its business, sells the same to its customers after breaking the packages in which the same is shipped in such quantities as may be desired by its customers.

The Supreme Court of the United States in this case has decided that the first above mentioned class of business carried on by the plaintiff in this state, that is, gasoline brought into the State and sold in tank cars or original packages, is beyond the taxing power of the State, and the excise tax of two cents per gallon cannot be imposed on this class of business of the plaintiff, nor can the license tax of Fifty Dollars be imposed on interstate business; that the retail business conducted by the plaintiff, that is, the sale of gasoline in quantities to suit purchasers after the original packages have been broken, although the gasoline was brought into the State in interstate commerce, is a proper subject of taxation by the State.

The Supreme Court having decided that the statute is invalid insofar as it applies to shipments and sales in the original packages, and that the taxing of the retail business is a valid exercise of the power possessed by the State and is therefore valid as applied to

domestic sales, the question for this Court to determine is: Is this statute separable and capable of being sustained as far as it imposes a tax upon domestic business legitimately taxable?

The wording of the statute includes both interstate and domestic business. It defines the distributor of gasoline as "every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this state."—"Every distributor of gasoline shall pay an annual license tax of Fifty Dollars for each distributing station or place of business or agency."—"There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this state after July 1st, 1919." Its meaning is not ambiguous, but the language used is plain and clear, and there is no room for interpretation by the court.

The plain language of the statute includes every distributor of gasoline, whether selling at retail or in original packages, and imposes an excise tax upon all gasoline whether sold *in* retail or in the original packages. It does not exempt from the license tax persons engaged in selling gasoline in the original packages, or exempt gasoline sold in original packages from the two cent excise tax. If the legislature had not intended to tax interstate business it could have easily inserted in the law the words "Except distributors who ship gasoline into the State and sell it in the containers in which shipped," or words of similar meaning. Since the Legislature did not do this, it is not for the court to read this language into the statute and thereby give it a meaning the legislature might never have intended.

The case of Cella Commission v. Bohlinger 147 Fed. 419, seems to me to be conclusive on this proposition. The court there had under consideration a statute of Arkansas, which is as follows:

"In all cases where a cause of action shall accrue to a resident or citizen of the State of Arkansas, by reason of any contract with a foreign corporation, or where any liability on the part of a foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort, or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served, or has not an officer continuously residing in this state upon whom summons and other process may be served so as to authorize a personal judgment, service of summons and other process may be had upon the Auditor of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject matter, whether sitting in the township or county where the Auditor is served, or elsewhere in the state. This act shall not be effective in cases where its enforcement would conflict with the powers of Congress or the federal laws to regulate commerce between the states."

In passing upon this statute, the court said:

"The question is whether a statute of a state which includes by general language foreign corporations without as well as those within the constitutional jurisdiction of the state may be lawfully limited by judicial construction to the former class. Where a law is constitutional in part and unconstitutional in part, the former part may often be sustained, while the latter fails. But there are two indispensable conditions of such a result, that the constitutional and the unconstitutional parts are capable of separation so that each may be read and may stand by itself (citing cases), and that the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the legislature in enacting it. (Citing list of cases.)"

There are a number of citations from the Supreme Court of the United States in this case sustaining the principle laid down in this opinion for the interpretation of statutes similar to the one now under consideration.

32 In the case of the United States v. Reese, 92 U. S. 214, (Cited and quoted in the Cella Commission Company case), the court said:

"Congress had enacted a law which prescribed punishment for the unlawful refusal to accept votes from all voters while its constitutional power was limited to prescribing the penalty for refusing to receive votes 'on account of the race, color, or previous condition of servitude of the voter.' The contention of the government was that the act was constitutional as to all refusals to receive votes on account of the race, color, etc. of the voter, and that it could be sustained to this extent and permitted to fail in other cases because the two classes of cases and the two portions of the act applicable to them were readily separable."

But the argument failed. The Supreme Court said:

"We are, therefore, directly called upon to decide whether a penal statute, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section but by inserting those that are not now here. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction unless it be as to the effect of the Constitution. The questions, then, to be

determined is, whether we can introduce words of limitation
33 into a penal statute so as to make it specific, when as expressed, it is general only."

In the case of Spraigue v. Thompson, 118 U. S. 90, (Cited and quoted from the Cella Commission Company case), it is said:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

I therefore conclude that Sections 2 and 3 of the Act of the Legislature of the State of New Mexico, being An Act providing for an Excise Tax upon the Sale or Use of Gasoline and For a License Tax to be Paid by Distributors and Retail Dealers Therein; Providing for Collection and Application of such Taxes; Providing for the Inspection of Gasoline and Making it Unlawful to Sell Gasoline Below a Certain Grade Without Notifying Purchaser thereof; Providing Penalties for Violations of This Act and for Other Purposes, clearly include within their terms a tax upon interstate commerce, as well as domestic business and are not separable, and are therefore void in toto.

On appeal of this case to the Supreme Court of the United States the court in its opinion said:

34 "from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is non-taxable, and at this preliminary stage of the case we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing."

It is contended by counsel for defendants that in view of this language used by the Supreme Court, the relative importance of the business done by the plaintiff, that is, the amount of interstate business as compared to domestic business, should control and govern the court in determining the validity of this law. It is true as shown by the stipulation filed in this cause, that more than 90% of the business done by the plaintiff is domestic or retail business. I do not think the Supreme Court intended to lay down a new rule of law to guide the court in passing on the separability of statutes of this kind. If the Court construed this statute according to the contentions of coun-

sel for defendant, the court would, in a case where 95% of the business was retail and 5% interstate, have to hold the law was separable and valid as to such retail business. On the other hand if 95% of the business was interstate and 5% retail or domestic business, the court would have to hold the law unconstitutional. I do not think the court meant that any such rule should be followed. In the case now being considered, the interstate business is not an incident of plaintiff's business, but a material part of its regular business.

Plaintiff by trial amendment alleges that it uses gasoline at each of its distributing stations in the State of New Mexico in its automobiles and trucks used in carrying on and operating its business of distributing gasoline, and that the gasoline so used is part and parcel of the gasoline shipped into the state of New Mexico in interstate commerce. They contend that the imposition of a tax of two
35 cents per gallon upon the gasoline so used by it is in violation of the provisions of Section 1, Article VIII, of the Constitution of the State of New Mexico, because the same is not levied in proportion to the value of the gasoline.

Having decided that the statute is void, and that no license tax for dealing in gasoline, or excise tax for the sale and use of the same, can be imposed, I do not deem it necessary to decide this point. It is a question of construction of the provisions of the Constitution of the State of New Mexico, and I do not think a federal court should decide this question unless a decision thereof is necessary for a determination of the case.

The defendants will be enjoined from collecting from plaintiff the license tax of Fifty Dollars, and the excise tax of two cents per gallon on all gasoline sold or used by them.

It is so ordered.

COLIN NEBLETT,
U. S. District Judge.

Santa Fe, New Mexico, this 30th day of December, 1920.

(*Final Decree and Perpetual Injunction. Filed and Entered of Record December* 31, 1920.)

This cause coming on for final hearing and trial, and the court having heretofore heard the evidence and arguments of counsel and having filed his opinion in writing herein, holding that certain Act of the Legislature of the State of New Mexico, approved March 17th, 1919, unconstitutional and void for the reasons stated in said opinion, and due notice of the entry of final decree herein having been given, and counsel for the plaintiff and defendants being present:

It is ordered that the temporary injunction heretofore granted in this cause upon the 15th day of July, 1919, be made per-
36 petual, and

It is Therefore Ordered, Adjudged and Decreed that the defendants and each of them be and they are hereby perpetually enjoined and restrained from taking any action looking to the enforcement, as against the plaintiff in this cause, of that Act of the Legisla-

ture of the State of New Mexico, approved March 17th, 1919, and entitled:

"An Act providing for an Excise Tax upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein; Providing for Collection and Application of Such Taxes; Providing for the Inspection of Gasoline and Making it Unlawful to Sell Gasoline below a certain grade without Notifying Purchasers Thereof; Providing Penalties for Violations of this Act and for Other Purposes."

To all of which the defendants duly except.

Done in open court at Santa Fe, New Mexico, this 31st day of December, 1920.

COLIN NEBLETT,
District Judge.

(*Defendants' Petition for Appeal. Filed December* 31, 1920.)

To the Honorable Colin Neblett, District Judge:

The above named defendants feeling aggrieved by the decree rendered and entered in the above entitled cause on the 31st day of December, A. D. 1920, do hereby appeal from the said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon
37 which said appeal was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, under the rules of said court in such case made and provided.

And your petitioners further pray that a proper order relating to the required security to be required of them be made.

O. O. ASKREN,
Attorney General for the State of New Mexico;
HARRY S. BOWMAN,
Assistant Attorney General for the State of New Mexico;
A. B. RENEHAN,
Special Assistant Attorney General for the State of New Mexico,
Attorneys for the Appellants.

(*Assignments of Errors. Filed December* 31, 1920.)

Now come the defendants in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause, from the decree made by the said Honorable Court on the 31st day of December, 1920, to-wit:

I.

That the United States District Court for the District of New Mexico erred in sustaining the demurrer interposed by the plaintiff and appellee to the defendants' answer filed in the said cause.

II.

That the said District Court erred in sustaining in effect the motion interposed by the plaintiff and appellee to certain parts of the defendants' answer filed in the said cause.

III.

That the said court erred in sustaining the prayer of the complaint and granting the injunction prayed for by the plaintiff.

IV.

That the said court erred in granting the plaintiff the
38 relief prayed for for the following reasons:

(*a*) That it holds the act in question not separable, contrary to the law;

(*b*) That it presumes the said law to affect interstate commerce, contrary to the presumption of law that it shall affect only such business as is within the power of the state legislature to affect, and contrary to the express disclaimer of the State that the said law as interpreted by the law officers of the State relates only to intrastate commerce, ignoring the fact that at the time the temporary injunction herein was obtained and at the time of each continuance of such temporary injunction, no attempt had been made to enforce the said law or any part thereof as against interstate commerce.

V.

The said court erred in holding the said law unconstitutional and void in respect to the excise tax of two cents per gallon, as an interference with interstate commerce, for the reason that the said law did not purport to affect interstate commerce, and shall not be presumed as affecting interstate commerce, and because the law officers of the State of New Mexico, and thereby the State of New Mexico, especially declared that the said law was not intended to affect interstate commerce and would not be by the said state so interpreted and enforced as to affect interstate commerce, but would be limited only to intrastate commerce.

VI.

The said court erred in holding the said law unconstitutional and void in relation to the license tax therein required, for all the reasons hereinbefore stated with reference to the said excise tax of two cents per gallon, and for the further reason that the said license tax is a lawful exaction upon the privilege of the plaintiff to do business in the State of New Mexico.

VII.

39 The court erred in holding, in effect, that the relative importance of the business done at retail and in broken packages and at wholesale and in unbroken packages was an unimportant consideration, for the reason that the said holding is in contravention of the decision and rule of the Supreme Court of the United States in this cause.

VIII.

The said court erred in its findings and decree in the following respects:

(*a*) In holding that the statute in question cannot be construed as relating only to intrastate business;

(*b*) In finding upon presumption, or otherwise, that the said law necessarily imposed a burden upon interstate commerce, without regard to the manner of its enforcement, and without regard to the fact that it properly should be construed as affecting only intrastate commerce, and without regard to the fact that the State of New Mexico, by its proper officers disclaimed any intention to so interpret or enforce said law as to interfere with or lay a burden of any kind upon interstate commerce, and without regard to the fact that the plaintiff had not been injured herein since no attemp- had been made at any time to affect its interstate business;

(*c*) In holding that the said law is not separable so as to affect only intrastate commerce and not to affect interstate commerce, contrary to law and contrary to the presumption that it was intended by the state legislature to relate only to those subjects of taxation which were within its domain to affect.

IX.

The court erred in making said injunction permanent for the reason that such ruling and determination is contrary to law and contrary to equity, and is an improper interference with state legislation.

Wherefore, the appellants pray that the said decree may be
40 reversed and that the said District Court for the District of New Mexico be order- to enter a decree reversing the decision of the lower court in said *cuase*.

O. O. ASKREN,
Attorney General for the State of New Mexico;
HARRY S. BOWMAN,
Assistant Attorney General for the State of New Mexico;
A. B. RENEHAN,
Special Assistant Attorney General for the State of New Mexico,
Attorneys for the Appellants.

(*Order Granting Appeal, Filed and Entered of Record, December 31, 1920.*)

On motion of O. O. Askren, Attorney General of the State of New Mexico, Harry S. Bowman, Assistant Attorney General of the State of New Mexico, and A. B. Renehan, Special Assistant Attorney General of the State of New Mexico, solicitors and counsel for the defendants in the said cause, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that a bond on appeal be fixed at the sum of One Thousand Dollars ($1,000.00).

COLIN NEBLETT,
District Judge.

(*Bond on Appeal, Filed January 6, 1921.*)

Know all men by these presents that we O. O. Askren, Attorney General of the State of New Mexico, Charles U. Strong, Treasurer of the State of New Mexico, Manuel Martinez, Secretary of State
41 of the State of New Mexico, and Alexander Read, District Attorney of the First Judicial District of the State of New Mexico, as principals, and J. H. Vaughn and W. E. Groff, as their sureties, of the County of Santa Fe and State of New Mexico, are held and firmly bound unto The Continental Oil Company, a corporation, in the sum of One Thousand Dollars ($1,000.00) lawful money of the United States, to be paid to it and its successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 31st day of December, 1920.

Whereas, the above O. O. Askren, Attorney General of the State of New Mexico, Charles U. Strong, Treasurer of the State of New Mexico, Manuel Martinez, Secretary of State of the State of New

Mexico, and Alexander Read, District Attorney of the First Judicial District of the State of New Mexico, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the District of New Mexico, in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named O. O. Askren, Attorney General of the State of New Mexico, Charles H. Strong, Treasurer of the State of New Mexico, Manuel Martinez, Secretary of State of the State of New Mexico, and Alexander Read, District Attorney of the First Judicial District of the State of New Mexico, shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

O. O. ASKREN.
MANUEL MARTINEZ.
ALEXANDER READ.
J. H. VAUGHN.
W. E. GROFF.

42 STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 6th day of January, 1921, before me personally appeared O. O. Askren, Manuel Martinez and Alexander Read, J. H. Vaughn, and W. E. Groff, respectively known to me to be the persons described in and who executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said J. H. Vaughn and W. E. Groff being respectively by me duly sworn say, each for himself and not one for the other, that he is a resident and householder of the said county of Santa Fe, and that he is worth the sum of $1,000.00 over and above his just debts and legal liability and property exempt from execution.

J. H. VAUGHN.
W. E. GROFF.

In witness whereof, I have hereunto set my hand and notarial seal this 6th day of January, A. D. 1921, at Santa Fe, New Mexico, when and where the said instrument was subscribed and sworn to before

[Notarial Seal.] CARL H. GILBERT,
Notary Public.

My commission expires February 24, 1922.

The within and foregoing bond is approved both as to sufficiency and form this 6th day of January, A. D. 1921.

COLIN NEBLETT,
District Judge.

43 *Præcipe for Transcript.*

Filed Jan. 15, 1921.

To the Clerk of said Court:

Please prepare, promptly, record of the said cause on appeal containing the following items, to-wit:

1. The complaint.
2. The motion to dismiss the complaint.
3. The order overruling the motion to dismiss the complaint.
4. The answer.
5. Plaintiff's motion to strike part of the answer.
6. The opinion of the court.
7. The final judgment herein.
8. The petition for appeal.
9. Assignments of error.
10. The order granting appeal.
11. The appeal bond.
12. The citation with the acknowledgment of service thereon.
13. The notice to settle bill of exceptions with the acknowledgment of service thereon, to consist of the facts stipulated in open court.
14. The bill of exceptions as settled.
15. This præcipe with the acknowledgment of service thereon.
16. Statement of costs.

A. B. RENEHAN,
One of the Attorneys for Defendants.
Santa Fe, New Mexico.

The Plaintiff, The Continental Oil Company, a corporation, by its attorney, hereby acknowledges service of a copy of this præcipe upon it this 8th day of January, 1921.

THE CONTINENTAL OIL COMPANY,
By E. R. WRIGHT,
One of Its Attorneys.

Bill of Exceptions.

Filed Jan. 14, 1921.

44 O. K.
Notice waived.
E. R. WRIGHT.

On October 22, 1920, this cause came on for final hearing, Mr. Brock of Smith, Brock and Ferguson, E. R. Wright, and Stephen B. Davis, Jr., appearing for plaintiff, and O. O. Askren, appearing personally and by A. B. Renehan, special Assistant Attorney General for this case, and the following stipulation was entered into in open court:

By Mr. Brock: It is stipulated by the plaintiff and defendants that within the year 1918 in the regular course of business, the Continental Oil Company shipped from other states into the State of New Mexico, 77,243 barrels of gasoline of 50 gallons each, and sold that quantity of gasoline after breaking the packages, barrels and tanks in which it was shipped, and that this quantity is the aggregate of sales made in that year in broken packages in the various ways in which such sales were conducted by the Continental Oil Company; that is, from barrels or cases, or from the bulk (by which is meant stationary tanks) stored in the state or from milk cans or tank wagons.

It is also agreed that within the year 1918 in the regular course of business, the Continental Oil Company shipped into the State of New Mexico from other states, 4,608 barrels of gasoline of 50 gallons each, all of which was sold in the barrels, packages or tank cars in which shipped, and without breaking the package in which the shipment was made.

It is also stipulated that in the year 1919, the aggregate sales made in the way first above described, that is, from broken packages, of gasoline shipped into the State of New Mexico from other states, amounted to 75,998 barrels of 50 gallons each, and the aggregate quantity of gasoline shipped into New Mexico and sold in the manner secondly above described, that is in the containers in
45 which shipped, amounted to 1,687 barrels of 50 gallons each.

It is also stipulated that for the first 7 months of the year 1920, the Continental Oil Company sold, in the manner first above described, that is from broken packages of gasoline shipped into the State of New Mexico from other states, the aggregate quantity of 50,447 barrels of 50 gallons each, and during the same time shipped and sold in the manner secondly above described, that is, shipped into the state from other states, and sold in the containers in which shipped, 5,291 barrels of 50 gallons each.

It is further stipulated that as to the year 1919, of the total sold in broken packages 31,551 barrels of gasoline *were* sold prior to July 1st of that year, and 356 barrels within the same time *was*

sold in the containers in which shipped into the State. That during the second half of 1919 there *was* sold in broken packages 43,447 barrels of gasoline of 50 gallons each, and in the containers in which shipped, there *was* sold during the same time 1,331 barrels of 50 gallons each.

It is further stipulated that from July 1, 1919, to August 1, 1920, the Continental Oil Company consumed for its own use of gasoline which it had shipped from other states, 7,984 gallons; this quantity being consumed by the plaintiff in the regular conduct of its business. Of this quantity 3,600 gallons were consumed from July, 1919, to December, 1919, inclusive, and 4,384 gallons were consumed and used from January, 1920, to July, 1920, inclusive.

By Mr. Renehan: The statement of sales and use of gasoline as aforesaid represents the ordinary course of business of the said company as conducted during this period and for the pur-
46 pose of this case, representing the ordinary business of the company, but so far as the percentages of the two kinds of business are concerned, it merely represents the actual facts for the time mentioned and it is admitted that the future percentages will depend upon the circumstances and demands of the customers of the company.

While admitting the statements of facts as presented subject to clarifying, the same may be assumed in accordance with Mr. Brock's original opening statement to the court, I object to that part of the statement of facts concerning the first 7 months of the year 1920 as immaterial, irrelevant and incompetent, and particularly as being self serving in that it shows a modification of the common experience and ordinary business course of the company during that period of time by way of a material increase, that is, from approximately 2½ per cent of sales in original packages to about 10 per cent, and because the same is self serving.

Plaintiffs rest.
Defendants rest.
Argument by counsel.
Case submitted to the court.

47 *Reporter's Certificate.*

UNITED STATES OF AMERICA,
District of New Mexico, ss:

I, Ethel F. Stevenson, do hereby certify that I am now and was at all times during the regular October 1920 Term of the District Court of the United States for the District of New Mexico, the duly appointed and acting court reporter of said court; that the above and foregoing transcript, consisting of three pages constitutes and is a full and true transcript of all the proceedings had in open court during the final hearing of cause No. 679, wherein The Continental Oil Company is plaintiff and O. O. Askren, et al. *is* defendant-, and that no testimony nor exhibits were had or introduced on the trial thereof.

Witness my hand, at Santa Fe, New Mexico, this 4th day of January, A. D. 1921.

ETHEL F. STEVENSON,
Official Court Reporter.

48 *Judge's Certificate.*

UNITED STATES OF AMERICA,
District of New Mexico:

Inasmuch as the matters and things contained in the foregoing stenographer's transcript, consisting of four pages of typewritten matter, are not apparent on the face of the record proper in said cause, now on motion of A. B. Renehan, Esq., of counsel for defendants, and notice thereof having been waived by E. R. Wright, Esq., of counsel for plaintiff,

I, Colin Neblett, Judge of the District Court of the United States for the District of New Mexico, who presided during the trial of said cause, by virtue of the authority vested in me by law, do hereby certify that said foregoing transcript is a true and perfect transcript of the proceedings had in open court during said trial, and said transcript is hereby settled, signed and enscaled by me as a Bill of Exceptions in said cause, for review on appeal to the Supreme Court of the United States.

At Santa Fe, in said District, this January 14, 1921.

COLIN NEBLETT,
U. S. District Judge.

49 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of New Mexico, ss:

I, Wyly Parsons, Clerk of the District Court of the United States for the District of New Mexico, do hereby certify that the above and foregoing, consisting of 48 pages of typewritten matter, is a full and true transcript of the record in said cause, as shown from the files and record of my office therein, and as called for by defendants' præcipe for transcript at page 43 thereof.

In Witness whereof, I have hereunto set my hand and affixed the seal of said court, at Santa Fe, in said District, this 15th day of January, A. D. 1921.

[Seal of United States District Court, District of New Mexico.]

WYLY PARSONS, *Clerk.*

Endorsed on cover: File No. 28,052. New Mexico D. C. U. S. Term No. 695. O. O. Askren, Attorney General of the State of New Mexico, et al., appellants, vs. The Continental Oil Company. Filed January 22d, 1921. File No. 28,052.